Supreme Court, U.S.
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No. 93-92

In The

Supreme Court of the United States

October Term, 1993

AUBREY WILLIAMS,

PETITIONER,

v.

CAROL M. PALMORE, COMMONWEALTH OF KENTUCKY, KENTUCKY LABOR CABINET, REX HUNT, ROXANNE MILLER, ELAINE LIKENS, MARY MILES, DENIS KLINE, MARY ANN KIWALA, AND PATRICIA HAYDEN,

RESPONDENTS.

On Petition for a Writ
of Certiorari to The Supreme Court
Of The Commonwealth of Kentucky

RESPONDENTS' BRIEF IN OPPOSITION

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STATUTE INVOLVED

K.R.S. 344.040. Discrimination by employers. It is an unlawful practice for an employer:

(1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's disability, race, color, religion, national origin, sex, age between forty (40) and seventy (70), or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking;

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Carol M. Palmore, Commonwealth of Kentucky, Kentucky Labor Cabinet, Rex Hunt, Roxanne Miller, Elaine Likens, Mary Miles, Denis Kline, Mary Ann Kiwala, and Patricia Hayden (hereinafter collectively the "Respondents"), respectfully pray that a writ of certiorari not be issued to review the judgment and opinion of the Kentucky Court of Appeals decision entered on April 24, 1992, affirming a grant of summary judgment by the Jefferson Circuit Court.[1]

STATEMENT OF THE CASE

This garden variety civil rights action arises from the discharge for cause of the Petitioner, Aubrey Williams,[2] from his position as director of the Special Fund Division of the Kentucky Labor Cabinet on September 2, 1987. The director position is a patronage position and, as such, is not covered by state civil service protections afforded non-patronage (merit) employees. Williams filed a Complaint in June 1988 alleging that he had been discriminated against on

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[1] Although Petitioner seeks a Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky, such writ would be properly directed to the Court of Appeals since it was the highest state court to actually review and decide the case.

[2] Although Williams is representing himself pro se, he is a licensed and practicing attorney.

the basis of his race against numerous defendants, including the Kentucky Labor Cabinet; Carol Palmore, the then Acting Secretary of the Kentucky Labor Cabinet and, as such, Williams's employer; and numerous Labor Cabinet employees, most of whom had worked under Williams's supervision.

Williams had been appointed as director of the Special Fund in 1984. During the spring and summer of 1987, he was the subject of a number of grievances by his subordinates and complaints concerning his misuse of state property and employees for personal business. Accordingly, Carol Palmore, as Acting Secretary of the Kentucky Labor Cabinet, appointed a personnel administrator and a staff attorney[3] to conduct an internal investigation of the Louisville office of the Special Fund where the complaints arose and Williams primarily worked.

After reviewing the report produced by the investigators detailing the results of their investigation[4], Palmore discharged Williams on September 2, 1987 for:

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[3] The two investigators had never worked under Williams's supervision and neither were they connected with the Louisville office.

[4] All Special Fund employees were notified in advance of the investigation and were urged to cooperate fully. Williams, however, rejected repeated invitations to participate in the investigation.

1. Erratic management style and harassment and intimidation of employees under your supervision;

2. Your violation and threatened violation of rights afforded to Merit employees by Personnel Rules and Regulations;

3. Strong evidence of your misuse of state personnel, equipment, supplies, and postage for personal reasons.

Following Williams's dismissal, Secretary Palmore appointed Larry Beale, who also is Black,[3] to serve as director of the Special Fund.

As a non-merit patronage employee, Williams was subject to discharge without cause. Secretary Palmore informed Williams in her letter of dismissal, however, that he was being discharged for cause giving Williams the opportunity to appeal his dismissal to the State Personnel Board. Williams chose not to appeal and, instead, filed a race discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). The EEOC did not conduct an investigation but issued a right-to-sue notice and the present action followed.

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[3] Williams's assertion that he was the "only black director in the entire history of the Labor Cabinet," Pet. for Cert. 9, is simply false.

The trial court noted early in the proceedings that Williams's factual allegations were "nebulous at best", and dismissed six defendants against whom no claims had been stated in the Complaint. After giving Williams free reign to conduct discovery[6] for two and one-half years on the issues and facts surrounding his discharge, the trial court granted summary judgment dismissing all of Williams's claims. On April 24, 1992,[7] the Kentucky Court of Appeals affirmed the trial court's order, meticulously following McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), and its progeny to determine both that Williams had failed to establish a prima facie case of discrimination and that there was no evidence Secretary Palmore's stated, legitimate reasons for discharging Williams were pretextual.[8]

Williams moved the Supreme Court of Kentucky to grant discretionary review. The Supreme Court denied the motion on March 12, 1993.

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[6] More than twenty depositions were taken. Williams did not file, however, all the depositions he took in the record.

[7] Williams mistakenly identifies this date as September 4, 1992. Pet. for Cert. at 1.

[8] Although Williams argues in his Petition that similarly situated white employees were treated or disciplined differently, there was no support for these contentions in the record below.

Williams now seeks to have this Court review the decision of the Kentucky Court of Appeals despite the fact that it scrupulously followed federal Title VII case-law and no novel questions of first impression or conflicts between state and federal civil rights law were raised or created.

REASONS WHY THE PETITION SHOULD BE DENIED

SUMMARY OF ARGUMENT

The Supreme Court Rules provide that a petition for a writ of certiorari "will be granted only when there are special and important reasons therefor". Sup.Ct.R. 10.1. In cases such as the present case this normally requires that:

> a state court ... has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Sup.Ct.R. 10.1(c). No issue of either nature has been raised herein. Thus, there are no "special and important reasons" which would justify a writ of certiorari.

No question of first impression which should be settled by this Court has been raised. The questions of federal law raised below have been long-settled by this Court's decisions in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973); Furnco Construction Corporation v. Waters, 438 U.S. 567 (1978); and Texas Department

of Community Affairs v. Burdine, 450 U.S. 248 (1981). The Kentucky Court of Appeals, the highest state court to consider the merits of this matter, properly interpreted and followed the law set forth in these decisions. Williams is simply unhappy with the results.

The ruling of the Kentucky Court of Appeals is entirely consistent with the decisions of this Court. Accordingly, Williams's petition for a writ of certiorari should be denied. Braxton v. United States, ___ U.S. ___, 111 S.Ct. 1854, 1857 (1991) (stating that the principal purpose for granting certiorari is to resolve conflicts concerning federal law).

I.

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION.

A. No Conflict Exists Between the Decision Below and Decisions of This Court.

Williams claims that "the decision below places Kentucky in direct conflict with the firmly established principles espoused by the United States Supreme Court in Title VII type cases". Pet. for Cert. i. Specifically, Williams claims that the Kentucky Court of Appeals misconstrued and misapplied this Court's decisions in Furnco Construction Corporation v. Waters, 438 U.S. 567 (1978), McDonnell Douglas Corporation v. Green, 411 U.S. 792

(1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The claimed conflict does not exist, however, as a review of the Kentucky Court of Appeals' opinion reveals.

Williams's race discrimination claims were not brought under Title VII to the federal Civil Rights Act of 1964, as amended. Instead, Williams chose to proceed solely under Kentucky's Civil Rights Act, KRS Chapter 344. The Kentucky Civil Rights Act is intended, among other things, "[t]o provide for the execution within the state of the policies embodied in the Federal Civil Rights Act as amended ...." KRS 344.020(1)(a). Accordingly, the Kentucky courts generally look to federal law in interpreting KRS Chapter 344. See KRS 344.020(1)(a); Harker v. Federal Land Bank, 679 S.W.2d 226, 229 (Ky. 1984); White v. Rainbo Baking Co., 765 S.W.2d 26, 28 (Ky. App. 1988); Kentucky Comm'n on Human Rights v. Commonwealth, Dep't of Justice, Bureau of State Police, 586 S.W.2d 270, 271 (Ky. App. 1979).

The Kentucky Court of Appeals, in a carefully considered opinion, specifically noted that "[t]he parties practiced this case under the three-step analysis for this type

of claim outlined in McDonnell Douglas ...." [1] Appendix to Pet. for Cert. (hereinafter "App. ___") at 16. The court continued to utilize the McDonnell Douglas prima facie test, which it articulated as follows:

> A prima facie case is established by showing that the complainant is a member of a racial minority, that he satisfactorily performed his job, that nonetheless he was terminated, and that he was replaced by someone outside of the protected class.

App.16. Applying this standard, the court determined that Williams had failed to establish a prima facie case.

In Furnco, this Court, expounding on the prima facie case, said:

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[1] Williams's characterization of the Respondents misleadingly suggests that certain issues would be presented to the Court on certiorari which have no support in the record and which were not preserved on appeal. Significantly, Williams's descriptions of the racial composition of the Kentucky state government workforce, the business community of the state's largest city, the state judicial system, and the Labor Cabinet are totally without foundation on the record. Aside from questions of relevancy, there are no disparate impact issues which have been preserved for review.

Williams's disparate impact claims, if any, were raised in his First Amended Complaint which added as defendants all constitutional officers of the Commonwealth, including the governor. After two years of discovery, the First Amended Complaint and the claims against the constitutional officers were dismissed by an agreed order. If Williams ever sought to raise any disparate impact claims those claims were clearly abandoned at that time.

> But McDonnell Douglas did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act". 431 U.S., at 358, 97 S.Ct., at 1866.

Furnco, 438 U.S. at 577. Fully mindful of the Furnco decision, the Kentucky Court of Appeals determined, on the basis of the record before it, that Williams had failed to carry this initial burden. App.17-18. There were no actions taken by Secretary Palmore, as Williams's employer, which, if left unexplained, could have raised an inference of discrimination.

As the Kentucky court noted, Williams could not satisfy the fourth prong of the McDonnell Douglas prima facie case because "the fact the person hired to replace him as director of the Special Fund, Larry Beale, was also black." App.19. The Kentucky Court of Appeals distinguished Furnco, but only to the extent that it involved an employer's hiring practices in general rather than the replacement of just one individual. App.19-20. The court did not rigidly end its inquiry there. It continued to find that the circumstances surrounding the hiring of Williams's replacement could not give rise to an inference of discrimination, stating:

> Williams's attempts to discredit the hiring of Beale are unavailing. Although he maintains Beale's hiring in a nonmerit position with less than three months remaining in the administration was unprecedented, he overlooks John C. Wells's testimony listing the reasons why appointments would be made and accepted with short periods remaining in an administration, as well as Wells's own appointment with six months remaining in an administration.

App.20. The Court of Appeals additionally found that Williams had failed to satisfy the second prong of his prima facie case because he "also failed to produce evidence that he was satisfactorily performing his job at the time of his dismissal".[10] Id. The Kentucky Court of Appeals interpreted and applied federal Title VII standards to Williams's state law civil rights claims in keeping with the standards articulated in McDonnell Douglas.

Williams also complains that the Kentucky Court misconstrued and misapplied this Court's decisions in McDonnell Douglas and Burdine because he contends it

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[10] Williams's job performance was totally inadequate at the time of his discharge. Among other problems were Williams's apparent lack of interest in, or understanding of, the operation of the Special Fund; his poor work attendance; his apparent inability to handle personnel problems; his mismanagement of a new employee; his mismanagement and overuse of contract attorneys; his inability or unwillingness to make management decisions necessary for daily operations; and his apparent indifference to or ignorance of personnel policies as evidenced by his flagrant disregard of mandated grievance procedures.

concluded that his employer's "mere articulation of specific reasons for the termination was sufficient". Pet. for Cert. at 18. In the same vein Williams also complains that the Court of Appeals "ignored cold hard facts which exposed the pretext [behind Secretary Palmore's decision to discharge him]." Id.

Both complaints are flatly contradicted by the record. Since Williams failed to establish a prima facie case, the Kentucky Court of Appeals was not required to pursue its inquiry any further. The court, which had noted that the McDonnell Douglas test was not meant to be "rigid, mechanized, or ritualistic", App.18. (quoting Furnco, 438 U.S. at 577), continued, however, to consider the stated legitimate reasons for Williams's discharge and found no basis for his claims of pretext.

Williams was given every opportunity to expose his employer's stated reasons as pretextual, but he completely failed to do so. The Court of Appeals stated that although

> [m]uch of Williams's brief is dedicated to showing that Palmore's stated reasons for dismissal were pretextual .... [l]acking in the evidence, however, are "cold, hard facts," [citation omitted], that Palmore's decision to terminate Williams was motivated by racially discriminatory reasons.

App.22-23. After more than two full years of discovery including over twenty depositions there was simply no evidence of pretext.

Williams's assertions that the state court misconstrued this Court's decision in McDonnell Douglas, Furnco and Burdine are groundless. The Kentucky Court of Appeals affirmed the trial court's grant of summary judgment because the record was completely devoid of any facts supporting Williams's claims." The state appellate court simply deter-

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" Williams lists eight "facts" he claims "were not denied by the Respondents" and which the Kentucky courts deemed "inconsequential" along with "the affidavits of white employees that the Petitioner was accorded the treatment he received because of his race". Pet. for Cert. at 18-19. Respondents point out, pursuant to Sup.Ct.R. 15.1, that Williams's "facts" and the affidavits he submitted, were either spurious and unsupported or of no relevance.

For instance, Williams informs the Court as follows:

> 6. The instigator of the internal [investigation] would refer to Williams as a nigger.

Pet. for Cert. at 19. The only evidence that a racial epithet was ever used came during Williams' own deposition when he stated that Roxanne Miller, an office secretary and his subordinate, had called him a "nigger" once "a year or two before" his discharge. Clearly, even if this isolated and unexplained incident occurred, it was insufficient to establish an actionable hostile work environment claim. Rabidue v. Osceola Refining Co., 805 F.2d 611, 619-20 (6th Cir. 1986). Moreover, Williams never showed any personal sensitivity to semantical issues referring on the record to his (continued...)

mined, as the federal courts would have done, that, on the basis of the record, Williams had failed to show any facts from which even an inference of unlawful discrimination could be derived. This case does not raise an important question of federal law which should be settled by this Court. Neither has the Kentucky court decided a federal question in a manner that conflicts with the applicable decisions of this Court. Accordingly, the Petition should be denied.

B. No Conflict Exists Between the Decision Below and Decisions of Lower Federal Courts.

Contrary to Williams's assertions, this case does not present any conflict with decisions of lower federal courts.

"(...continued)
replacement, Larry Beale, as "this boy", and one of opposing counsel as a "pretty smart girl". Furthermore, as an office secretary, Roxanne Miller had no authority to "instigate" the internal investigation.

All Williams's allegations about conspiracies between Secretary Palmore and secretaries, janitor/file clerks and others proved to be groundless. His assertion that "one of the principal Respondents confessed that a conspiracy led to the termination of the Petitioner", Pet. for Cert. 22, is false. The "principal" respondent Williams refers to was a janitor/file clerk with no supervisory duties whatsoever. The "confession" consisted of confidential psychiatric records which even Williams's heavy editing and redacting could not make into a confession of a conspiracy. The trial court considered this "new evidence" and determined it did not provide a basis for reopening the case. That decision was not appealed.

The McDonnell Douglas prima facie case is commonly understood and applied in the same manner as the Kentucky Court of Appeals applied it to Williams's claims. Many courts have found that no prima facie case existed where the replacement was also a member of the protected class. See Jones v. Public Defender Serv., 553 F.Supp. 1031, 1042 (D.D.C.), aff'd w/o opin., 720 F.2d 215 (D.C. Cir. 1983) (finding no prima facie case where replacement was Black); see also Carter v. Oliver T. Carr Co., 608 F.Supp. 381, 382 (D.D.C. 1985); Conley v. Kentucky Fried Chicken Corp., 606 F.Supp. 235, 238 (W.D.Ky. 1985) (finding charges of discrimination to be negated where the replacement was Black).

The cases cited by Williams do not call for a different result. Neither Jones v. Western Geophysical Company, 669 F.2d 280 (5th Cir. 1982), nor Howard v. Roadway Express, Inc., 726 F.2d 1529 (11th Cir. 1984), clearly involved the hiring of a replacement. Furthermore, the Fifth Circuit indicated in Jones that the main issue in determining whether a prima facie case had been established was whether the complainant could show that "he was discharged from the position for which he was qualified 'under circumstances which give rise to an inference of unlawful discrimination'." Id. at 284 (quoting Burdine, 450 U.S. at 253). Similarly, in Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181

(11th Cir. 1984), the court noted only that the race of a replacement was not irrelevant and that the court could consider replacement by a member of the protected class as evidence tending to show that an employer's proffered reasons were not pretextual. See id. at 1186n.1. As discussed, infra, the Kentucky Court of Appeals correctly applied the McDonnell Douglas paradigm in a manner consistent with these federal decisions. Williams simply failed to point to any circumstances giving rise to an inference of unlawful discrimination.

The Kentucky Court of Appeals did not misconstrue the law and, contrary to Williams's assertions, its holding does not put Kentucky in conflict with federal Title VII case-law. There simply were no facts in the record supporting Williams's claim and, accordingly, the Kentucky Court of Appeals determined that summary judgment had been properly granted.

II.

THE DECISION BELOW DOES NOT ENCOURAGE STATE COURTS TO ABUSE THEIR DISCRETION IN GRANTING SUMMARY JUDGMENT IN CIVIL RIGHTS PROCEEDINGS.

Amazingly, Williams brazenly contends that "the decision below encourages an abuse of discretion by state trial courts in summary judgment proceedings involving Title

VII litigation." Pet. for Cert. i. This claim is not only wholly without merit but, charitably speaking, it is disingenuous.

The federal summary judgment standards enunciated by this Court in the trilogy of Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corporation v. Catrett, 477 U.S. 317 (1986); and Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation, 475 U.S. 574 (1986), are more lenient than the stricter summary judgment standards applied by the Kentucky Court of Appeals herein. Indeed, in direct contrast to the argument in his Petition, Williams contended on appeal to the Kentucky Court of Appeals that the trial court had erred in applying the federal summary judgment standard and not the stricter Kentucky standard which had just been clarified and reaffirmed by the Kentucky Supreme Court in Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).

The Kentucky Supreme Court in Steelvest declined to adopt the summary judgment standards adopted by this Court in the federal trilogy opting for a stricter standard. According to the Kentucky Supreme Court, summary judgment is to be cautiously applied and, with other restrictions, "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his

favor and against the movant.'" See id. at 483 (citation omitted). Thus, under Kentucky law it is more difficult for a movant to obtain summary judgment.

Williams's argument that the decision below encourages premature grants of summary judgment is spurious. If Williams's case could not pass muster under the stricter Steelvest standard, then it certainly could not escape summary judgment under more lenient federal summary judgment standards. Williams does not show why summary judgment was "improvidently" granted under either standard. After making the conclusory statement that summary judgment should not have been granted, he provides a general diatribe on discrimination against minorities. None of this obscures the fact that the record did not contain sufficient evidence for Williams to establish a prima facie case or prove pretext.

Williams is playing fast-and-loose with the Court by suggesting that somehow summary judgment was not "cautiously granted". Pet. for Cert. 21. He cannot complain to the Kentucky Court of Appeals that the trial court erred by following the federal summary judgment standard and turn around now and argue before this Court that the federal standard should apply. Williams's attempt to garner the Court's attention by suggesting that summary judgment was given more readily than under federal standards should be

rebuffed and Williams's Petition for Certiorari should be denied.

CONCLUSION

There are no special and important reasons to review the Kentucky Court of Appeals decision. That court correctly applied the McDonnell Douglas prima facie case and other principles set forth in the decisional law of this Court. Williams simply failed to establish a prima facie case of discrimination. Neither could he point to any facts which would establish that his employer's stated, legitimate reasons for his discharge were pretextual. Under either the federal or the Kentucky summary judgment standards, the trial court's decision to dismiss Williams's claims was properly affirmed. Therefore, Respondents ask this Court to deny the petition for writ of certiorari to the Kentucky Court of Appeals.

Respectfully submitted,

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